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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 960

JOYCE FARNADY LUCAS, *Petitioner*,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a foreign corporation, GERALD DALE DAVIS and MARILYN J. DAVIS, *Respondents*.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

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JURISDICTION

No question of a violation of petitioner's rights under the United States Constitution Amendment Article XIV was raised in the proceedings below until reference was made to same in petitioner's Motion for Rehearing in the Supreme Court of the State of Wisconsin and the brief filed in support of said Motion.

QUESTIONS PRESENTED

When the trial judge found that the amount of the jury award was excessive and ordered a remittitur, or in the alternative a new trial on the issue of damages only, was said action an abuse of the trial court's discretion and a violation of petitioner's rights under the Seventh Amendment of the United States Constitution?

Petitioner's brief enumerates four questions allegedly presented in this petition. However, respondent contends that the foregoing is the sole question presented.

STATEMENT

There is no support in the record for the statements that the trial court's findings were "contrary to the undisputed credible evidence", or that the trial court determined that the jury's findings "has a basis in the evidence", or that the court found the verdict excessive solely "because" of the observations recited in petitioner's brief.

Neither is there any support in the record for the contention that the trial court "disregarded" or "selected" certain evidence pertaining to petitioner's alleged injuries.

REASONS FOR NOT GRANTING WRIT

The question which petitioner seeks to have reversed is not a matter of first impression in this Court. The cases of *Northern Pacific Railroad Company* v. *Herbert,* 116 U.S. 642, 29 L. Ed. 755, 6 S. Ct. 590, *Arkansas Valley Land & Cattle Company* v. *Mann,* 130 U.S. 69, 32 L. Ed. 854, 9 S. Ct. 458 and *Dimick* v. *Schiedt,* 293 U.S. 474, 79 L. Ed. 603, 55 S. Ct. 296 all have sustained the constitutionality of a trial court's action in ordering a remittitur in cases in which the jury verdict was deemed *excessive,* or in the alternative ordering a new trial.

In the instant case petitioner asks for review on the ground that the supreme Court of the State of Wisconsin has adopted a "new theory" in the case of *Powers* v. *Allstate Insurance Co., et al.,* 10 Wisconsin (2nd) 78, and that said "new theory" has been enlarged by the trial court and the Supreme Court of the State of Wisconsin in the instant case.

Various arguments have been advanced in support of this contention in numerous places in petitioner's brief.

These contentions will be answered by respondent under this heading.

Under the heading "Questions Presented" and elsewhere in petitioner's brief, the assertion is made that the trial judge in the instant case determined the jury's findings had a basis in the evidence, yet made his own conclusions in disregard of undisputed credible evidence.

Petitioner is no doubt alluding to that portion of the trial court's opinion which reads as follows:

> "It would serve no useful purpose to review the evidence further in detail as to the liability features. Suffice it to say that there is sufficient evidence to sustain the verdict of the jury, except as to the answers of the amount which is to be reduced. (Appendix B, Exhibit 5, p. 35)".

Taken in its proper context, it is apparent that the court was saying that there was sufficient evidence to support the verdict of the jury as to the liability feature of the case, but not as to the amount of the award, which was to be reduced.

Further, under "Questions Presented" in petitioner's brief, it is suggested that the court adopt discretionary power to modify the verdict "because it is favored by few attorneys". Nowhere in the record is there to be found any basis for this statement.

Again under "Reasons for Granting Writ" is made the assertion that "since the decision in the case of *Powers* v. *Allstate* (supra) verdicts have been modified in nearly all cases tried in Wisconsin; and for more and various reasons than were originally authorized by the *Powers* case (supra)." This too is without foundation in the record.

In fact, while it is not the decision in the *Powers* case (supra), per se, that is involved in this petition, an analysis of the opinion in said case reveals that the court followed the principle laid down by this court in *Arkansas Valley*

Land and Cattle Company v. *Mann* (supra). In the *Powers* case (supra) the court rejected the prior practice of fixing the *lowest amount* that an unprejudiced jury properly instructed might award for damages. Instead the court held that in dealing with excessive verdicts, the court should fix an amount which would constitute a fair and reasonable award under the evidence, or in the alternative, grant a new trial.

While it is true, as asserted in petitioner's brief, that respondent's motion filed in the trial court asked that the jury's verdict be reduced to the "lowest award that would be assessed by an impartial and unprejudiced jury", it is equally true that the trial court ordered a remittitur which would reduce the verdict to a "reasonable" amount. (Appendix G, Exhibit 5, p. 36, 41).

The contention is made that methods not recognized by the common law were employed by the trial court and sanctioned by the Supreme Court of Wisconsin in modifying the jury verdict in the instant case. However, petitioner does not amplify this assertion and in fact a close analysis of the opinion of the trial court proves that just the reverse is true. It is clear that the trial court carefully considered all of the evidence pertaining to petitioner's injuries and the likely results thereof. To say that the Court "disregarded" or "selected" certain evidence is an attempt to read into the court's action something that just did not occur. Neither is there foundation in the record for the assertion that the trial court arrived at conclusions contrary to undisputed credible evidence.

An analogy may be drawn between the action of the trial court in the instant case and that of the trial court in the case of *Arkansas Valley Land & Cattle Co.*, v. *Mann* (supra). This court in considering the propriety of the action of the trial court in the latter case, and the reasoning that the trial court may have employed in said case, stated:

"This court is not, however authorized to assume, from the mere fact that $22,833.33 was remitted, that the court below believed that the jury were governed by prejudice or willfully disregarded the evidence. On the contrary, it may be inferred that the amount for which the plaintiff was entitled to a verdict was ascertained by the court, after a calculation based upon the prices of cattle as given by numerous witnesses; or that the court became satisfied that the *preponderance* of evidence as to the ownership of some of the cattle was against the plaintiff; or, as to other cattle that they were not traced to the possession of the defendant. But independently of this view, and *however* it was ascertained by the court that the verdict was too large by the above sum, the granting or refusing of a new trial in a Circuit Court of the United States is not subject to review by this Court." (citing cases—italics supplied)

CONCLUSION

Respondent respectfully submits that the decisions of the trial court and the Supreme Court of the State of Wisconsin are in accord with applicable decisions of this court; that there has been no departure from the accepted and usual course of judicial proceedings, and therefore the petition for Writ of Certiorari should not be granted.

Respectfully submitted,

CHARLES C. COLLINS
ROBERT E. ANDERSON
Attorneys for Respondents

Dated at Washington, D. C., May 1, 1963.